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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RAY SCOTT, DIRECTOR OF ARKANSAS DEPT. OF HUMAN SERVICES; DR. CURTIS IVERY, COMMISSIONER OF SOCIAL SERVICES; AND ROY KINDLE, DIRECTOR OF PULASKI COUNTY SOCIAL SERVICES ..... *Petitioners*

VS.

DON G. DRAKE ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE EIGHTH CIRCUIT ERRED IN HOLDING THAT THE DISTRICT COURT CORRECTLY DENIED THE PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON RESPONDENT'S CLAIM THAT HE WAS DISCHARGED ON ACCOUNT OF THE EXERCISE OF HIS FIRST AMENDMENT RIGHTS.

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This Court should grant certiorari because the Eighth Circuit's ruling that the District Court was correct in denying summary judgment on the First Amendment issue conflicts with this Court's rulings in recent cases and the clear dictates of Rule 56.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The above-captioned Petitioners hereby petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (Reprinted as Appendix A to this Petition), filed on February 20, 1987, is reported at 812 F.2d 395 (8th Cir. 1987), and the opinion on rehearing (Reprinted as Appendix B to this Petition), filed on July 9, 1987, is reported at 823 F.2d 239 (8th Cir. 1987). The Memorandum Opinion and Order of the United States District Court is unreported, and is reprinted as Appendix C to this Petition. It is case number LR-C-84-525.

JURISDICTION

The judgment of the Court of Appeals was filed on February 20, 1987. Petitioners (Appellants/Defendants below) petitioned the Court of Appeals for rehearing, which Petition was denied on July 9, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The parties listed in the caption to this proceeding are all the parties involved in the case before the Eighth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Rule 56 of the Federal Rules of Civil Procedure provides:

> Summary Judgment
>
> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any party thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a

declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

This is a suit for damages and injunctive relief brought by Don G. Drake, a former employee of the Pulaski North Office of the Division of Social Services of the Arkansas Department of Human Services, against Ray Scott, Director of the Arkansas Department of Human Services, Roy Kindle, Director of the Pulaski North Office of the Division of Social Services; and Dr. Curtis Ivery, the former Commissioner of the Division of Social Services. The persons listed as Petitioners in this Petition for Writ of Certiorari were named as Defendants in the Complaint. The person listed as the Respondent in this Petition for Writ of Certiorari was the named Plaintiff in the Complaint. The Complaint alleged that Respondent was terminated from his employment as a case worker in the Pulaski North Office on February 15, 1984, in violation of his First Amendment rights of free speech and to petition government. The Complaint was filed on June 6, 1984. Petitioners moved to dismiss the original Complaint on April 17, 1985, and moved for summary judgment on July 1, 1985. After an Amended Complaint was submitted, Petitioners again moved to dismiss or in the alternative for summary judgment. The District Court denied these motions on February 13, 1986. Earlier, on December 13, 1985, the parties had mutually consented to proceed before the United States Magistrate, the Honorable H. David Young, U. S. Magistrate, who considered Petitioners' Motion and denied same.

Petitioners herein appealed the decision of the District Court to the Eighth Circuit Court of Appeals on the following grounds: that the District Court erred in denying Petitioners' Motion for Summary Judgment on the basis of qualified immunity; that the District Court erred in denying Petitioners' Motion to Dismiss Respondent's due process claim for failure to state a claim for which relief could be granted; and that the District Court erred in denying Petitioners' Motion for

Summary Judgment on Respondent's First Amendment claim. On February 20, 1987, the Eighth Circuit Court of Appeals filed an opinion in which it reversed the judgment of the District Court with respect to the due process claim, and affirmed the judgment of the District Court with respect to the First Amendment claim. On July 9, 1987, the Eighth Circuit Court of Appeals filed an opinion in which it denied the Petition of Petitioners herein for rehearing on the First Amendment claim, and in which it granted the Petition of Respondent herein for rehearing on the due process claim, but affirmed its previous opinion on that issue. (See Appendix A.)

This Petition for Writ of Certiorari applies only to the decision of the Circuit Court affirming the District Court's denial of summary judgment on the First Amendment issue.

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S RULING THAT THE DISTRICT COURT WAS CORRECT IN DENYING SUMMARY JUDGMENT ON THE FIRST AMENDMENT ISSUE CONFLICTS WITH THIS COURT'S RULINGS IN RECENT CASES AND THE CLEAR DICTATES OF RULE 56.

Rule 56 of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment

> . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once the moving party has made a showing of facts that entitled him to judgment as a matter of law, Rule 56(e) requires that

> . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

In this case, Respondent (Plaintiff in the District Court) claimed that he was terminated from his employment with the Social Services Division of the Arkansas Department of Human Services as a result of his informing superiors of the alleged waste of government funds and other improprieties by

the director of his work unit. The plaintiff asserted that this termination violated his right of free speech and to petition government.

Petitioners herein (Defendants in the District Court) are, Ray Scott, the Director of the Department of Human Services; Dr. Curtis-Ivery, then Commissioner of Social Services; and Roy Kindle, Director of the Pulaski County Social Services Office from which plaintiff was terminated. It is undisputed that Petitioner Kindle actually terminated plaintiff and that this termination was upheld on departmental appeal by Petitioners Ivery and Scott.

Petitioners moved for a summary judgment on the First Amendment claim, supporting their motion with:

(1) Petitioner Roy Kindle's affidavit stating that, at the time of Respondnt's termination, Petitioner Kindle had no knowledge of the statement for which plaintiff claims First Amendment protection in this lawsuit, and that Petitioner Kindle fired Respondent for being rude and insolent toward him and clients of the agency, for using disrespectful language to Petitioner Kindle, and for ignoring Petitioner Kindle's instructions as to Respondent's work;

(2) Respondent's deposition, in which Respondent stated that his termination by Petitioner Kindle, and the upholding of that termination by Respondents Ivery and Scott, were for reasons other than his allegedly protected statements;

(3) Responses to interrogatories to Respondent in which Respondent did not list as a reason for his termination his alleged statements, even though the interrogatories specifically asked for facts relating to his dismissal;

(4) A statement of material facts not in issue, pursuant to Local Rule 29.

As the District Court correctly noted in its opinion, "In order to establish a prima facia case of a violation of the First Amendment speech clause, the plaintiff must show that his conduct is constitutionally protected and that it was a substantial or motivating factor in the defendant's decision to dismiss him. *See, Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 278 (1977)." In supporting their motion for summary judgment, then, Petitioners successfully demonstrated that Respondent's allegedly protected conduct was not "a substantial or motivating factor in the defendant's decision to dismiss him." The supporting evidence shows clearly that Petitioner Kindle dismissed plaintiff, and Petitioners Scott and Ivery upheld that dismissal, because of Respondent's rude, insolent and unprofessional conduct, and that Petitioner Kindle could not have fired Respondent for Respondent's supposedly protected conduct because Petitioner Kindle did not know of that conduct.

Under Rule 56, then, in order to avoid summary judgment, Respondent was required to "set forth *specific* facts showing that there is a genuine issue for trial [emphasis added]," by responding with affidavits or other factual showings that the exercise of protected conduct was the substantial or motivating factor in the Petitioners' decision to terminate him. The record in this case, however, is absolutely and totally bereft of *any* factual showing on this issue at all by Respondent, much less a factual showing that there is a "genuine issue for trial." Respondent's response contained no factual showing that the termination resulted from Respondent's exercise of his First Amendment rights. Respondent's response merely echoed the naked allegations of his Complaint that some sort of conspiracy existed among the Petitioners to terminate the Respondent in retaliation for his exercise of his rights.

In explaining the summary judgment rule, this Court has held that

> In the face of the defendant's properly supported motion for summary judgment, the plaintiff [cannot] rest on his allegations of a conspiracy to get to a jury without 'any significant probative evidence tending to support the complaint.'

Anderson v. Liberty Lobby, Inc., 477 U.S. ___, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); quoting *First National Bank of Arizona v. Cities Service Company*, 391 U.S. 253, 20 L.Ed.2d 569, 88 S.Ct. 1575 (1968). The Court continued in *Anderson*, saying,

> . . . there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, [citation omitted], summary judgment may be granted.

91 L.Ed.2d at 212.

Here, there is not even any evidence that is "merely colorable," or "not significantly probative". Here, Respondent has submitted *absolutely no evidence* to carry the burden placed on him in Rule 56.

Despite the total lack of any kind of evidentiary showing at all by Respondent, the District Court denied summary judgment essentially without discussion. Appendix C, Memorandum and Order, pp. 5-6. The court merely stated that ". . . there exists a material fact as to whether or not the exercise of plaintiff's First Amendment rights entered into his dismissal," (Id. at 5-6). The Court failed to point out any facts, however, which indicated that Respondent had met his burden

under Rule 56. Indeed, the Court failed to even acknowledge the factual showing in support of their motion made by the Petitioners. The Eighth Circuit Court of Appeals, likewise, merely stated in its initial opinion that "a review of the record convinces us that sufficient evidence exists over all to indicate that Drake's suit is not insubstantial." Appendix A, p. 11. Like the District Court before it, the Court of Appeals failed to point to any specific evidence in the record which indicates that Respondent's First Amendment claim was substantial. On Petitioners' motion for rehearing at the Court of Appeals, the court was specifically asked to delineate which facts it found to be in dispute. Again, however, the court merely denied the petition for rehearing stating that "this issue was sufficiently discussed in our previous opinion." Appendix B, p. 2. In fact, there had been absolutely no discussion about what facts with regard to the First Amendment issue were in dispute, either at the district court level or in any opinion issued by the Eighth Circuit Court of Appeals. The issues raised by Petitioners herein on their motion for summary judgment have not been discussed fully or adequately by any court below. At no point has any court (or, for that matter, the Respondent) pointed to any evidence in the record which creates a genuine issue of material fact for trial. This is so because there is no such evidence.

The decisions below, then, conflict with the decisions of this court, the most recent of which, *Anderson v. Liberty Lobby*, clearly demonstrates that a respondent to a motion for summary judgment must assert some facts outside his bare pleadings to indicate that there is a genuine issue for trial. Accordingly, Petitioner believes that the Eighth Circuit Court of Appeals erred in applying the applicable law and that this Court should grant certiorari to review that decision.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-1353

Don G. Drake,	★	
	★	
Appellee,	★	
	★	
v.	★	
	★	
	★	On Appeal from the United
Ray Scott, Director of	★	States District Court
Arkansas Dept. of Human	★	for the Eastern District
Services; Dr. Curtis Ivery,	★	of Arkansas.
Commissioner of Social	★	
Services; and Roy Kindle,	★	
Director of Pulaski County	★	
Social Services,	★	
	★	
Appellants.	★	

Submitted: September 11, 1986
Filed: February 20, 1987

Before ARNOLD, Circuit Judge, BRIGHT, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

ARNOLD, Circuit Judge.*

Ray Scott, director of the Arkansas Department of Human Services, and other supervisory or former supervisory employees of the Department (supervisors) appeal from the

*The author of this opinion expresses his gratitude to Judge Bright for substantial help in its preparation.

magistrate's[1] denial of their motion for summary judgment or dismissal. The supervisors argue that they are entitled to qualified immunity from suit and that the plaintiff, Don G. Drake, has failed to state a cause of action. Proceedings have been stayed pending the outcome of this appeal. We affirm in part and reverse in part.

I.

Drake formerly worked as a caseworker with the Arkansas Department of Human Services. After serving with the agency for approximately four months, he claims to have reported a waste of public funds that allegedly had occurred in his office. Drake alleges that immediately afterwards the defendants began an orchestrated campaign to remove him from his job by, among other things, fabricating complaints against him from co-workers and clients. Drake was fired on February 15, 1984, for "dishonesty," and his letter of discharge gives the reason as "conduct unbecoming a state employee."

Drake appealed his discharge internally through the agency. The agency affirmed his dismissal without a formal hearing.[2] Drake then brought this suit, alleging that his supervisors who have been named as defendants deprived him

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[1]The Hon. H. David Young, United States Magistrate for the Eastern District of Arkansas. The parties agreed to proceed before Judge Young pursuant to 28 U.S.C. §636(c)(1).

[2]Drake first appealed his discharge to defendant Ivery, who upheld the discharge based solely on the file. Drake contends that Ivery was aware of the situation through the informal contacts they had with each other, but that Ivery merely "rubber stamped" the appeal. A further appeal was made to defendant Scott, who also upheld the discharge without a hearing. Scott, Drake says, made his decision before Drake could file statements on his own behalf. We assume for purposes of this opinion that Drake did not receive, either before or after his termination, the process that would have been due had he possessed a constitutionally protectable property interest in his job.

of his rights to due process and free speech. He seeks damages and injunctive relief, including reinstatement. The defendant supervisors filed a motion for summary judgment, asserting a qualified-immunity defense and that Drake had failed to state a due-process claim because he lacked a property interest in his job. The supervisors also contended that summary judgment was appropriate because Drake had failed to establish sufficient evidence in support of his First Amendment claim. The magistrate denied the motion, ruling that unresolved disputes of fact remained in the litigation.

II.

We are faced at the outset with the question whether this Court has jurisdiction to hear all issues raised on appeal. A denial of summary judgment is not a final judgment, but it is nonetheless appealable when it denies immunity to a government official. *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2817 (1985). In the present case, however, appellants raise more issues than an error in the denial of immunity in support of their assertion that summary dismissal of the action is appropriate. The appellant supervisors contend that the due-process claim must be dismissed because Drake lacks any property interest in his prior state job, and further that summary judgment is proper on Drake's First Amendment claim because he has failed to establish a genuine issue of material fact. Thus, although no final judgment exists, we are asked to review fully the magistrate's order denying summary judgment.

In response to this Court's inquiries about our jurisdiction to review these issues, appellants have cited *Wright v. South Arkansas Regional Health Center*, 800 F.2d 199 (8th Cir. 1986). In *Wright*, as here, the plaintiff sued officials of the Arkansas Department of Human Services, including its director, Ray Scott. Wright claimed that he suffered dismissal from his job in retaliation for the exercise of his First

Amendment rights. The defendants there sought summary judgment, asserting what they characterized as a qualified-immunity defense. In essence, they contended that because Wright had failed to establish a genuine issue of fact as to whether his First Amendment rights were violated, immunity should apply, notwithstanding Wright's pleaded claim that the defendant state officials had violated clearly established rights to free speech. The District Court denied summary judgment, and the defendants appealed.

Because Wright charged a state official with discharging him for an improper motive (retaliation for exercise of First Amendment rights), we acknowledged that we were being asked to examine a question that was in some sense factual. *Wright*, 800 F.2d at 203. We held, however, that we had jurisdiction to review the question whether any genuine issue of improper motivation existed to send to the jury. *Id.* Such review is necessary to protect public officials from insubstantial claims and is thus consistent with the purpose of *Mitchell*. *Id.* Furthermore, review of the sufficiency of the evidence did not require any evaluation of the evidence's weight, but rather was limited to a legal inquiry, such as that conducted on a motion for a directed verdict. *Id.*

In the present case, Drake raises two claims: that he suffered a discharge without due process and that the discharge rested on an intent to retaliate for his exercise of First Amendment rights. Drake seeks damages and equitable relief. The supervisors raise two defenses to the due-process claim: that they are immune from the suit for damages, and that Drake's complaint fails to state a claim because Drake could be fired at will and thus lacked any property interest in his job. As to the First Amendment claim, defendants argue (as they did in *Wright*) that Drake has failed to raise a genuine issue of fact as to retaliatory or otherwise improper motivation.

A further complication arises because Drake seeks both

damages and equitable relief. The Supreme Court in *Mitchell* left open the question whether a denial of qualified immunity is immediately appealable when the underlying claim seeks both damages and equitable relief. 105 S. Ct. at 2812 n.5. This Circuit addressed the issue prior to *Mitchell*, and held that an interlocutory appeal may be taken from a denial of immunity even when the employee's claim, in addition to seeking damages subject to the immunity defense, also seeks equitable relief, to which immunity is not a defense. *Tubbesing v. Arnold*, 742 F.2d 401, 404 (8th Cir. 1984). We see no reason to depart from this rule. See *Kennedy v. City of Cleveland*, 797 F.2d 297, 305-06 (6th Cir. 1986); *De Abadia v. Izquierdo Mora*, 792 F.2d 1187, 1189-90 (1st Cir. 1986) (following the *Tubbesing* rule in light of *Mitchell*)[3] Based on this authority, we accept jurisdiction to review the magistrate's denial of immunity.

As noted, appellants claim not only qualified immunity, but also that the due-process claim is deficient as a matter of law because Drake had no property interest. The question of Drake's property interest in continued employment is a different issue from that of immunity. Whether we have jurisdiction to review this issue on an interlocutory appeal appears to be a question of first impression discussed by neither *Mitchell* nor any court of appeals.

If Drake possesses no property interest, he cannot succeed on his claim, and we need not reach the immunity issue. The *Mitchell* Court stated that an appellate court "need not . . . determine whether the plaintiff's allegations actually state a

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[3]At least one circuit has held that when an appeal is taken from a denial of qualified immunity, and the underlying claims are for damages and equitable relief, an interlocutory appeal is not appropriate and the court will not review the denial of qualified immunity. *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir.), *cert. denied*, 469 U.S. 948 (1984). As noted above, this Circuit has taken the contrary view. Whether the Fourth Circuit would be of the same opinion after *Mitchell* is an open question.

claim," 105 S. Ct. at 2816, but that language referred to the factual content of the plaintiff's claim, not an underlying question of law that must be answered prior to application of the immunity defense. We think it makes sense for us to assume jurisdiction of the property-interest question. This question is analytically antecedent to, and in a sense also pendent to, the qualified-immunity issue that is concededly properly here under *Mitchell*. If we did not decide the property-interest question, and if we then upheld the District Court's rejection of the qualified-immunity defense, on remand it might still be necessary for the District Court to decide whether Drake had a property interest. If it decided he did not, the question of qualified immunity would drop out of the case, would never have to be reached, thus making the whole interlocutory appeal on the question of qualified immunity a needless ritual. In addition, in the present case the question of qualified immunity itself depends in large part on whether defendants knew or should have known that Drake had a clearly established property interest in the job at the time they fired him. If in fact there was as a matter of law no property interest, it follows *a fortiori* that no such interest was clearly established at the relevant time. We hold that when an interlocutory appeal is properly before us under *Mitchell* as to the defense of qualified immunity, we have jurisdiction also to decide closely related issues of law, such as whether the complaint fails to state a claim because of the absence of a property interest protected by the Due Process Clause.

As to Drake's First Amendment claim, the defendant supervisors contend that the allegation that the discharge rested on whistleblowing is without substance as a matter of fact. This defense is reachable in this interlocutory appeal. That issue is exactly the one raised and decided in *Wright*.

Thus, we take jurisdiction of the appeal and turn to the merits.

III.

Plaintiff did not have a contract of employment for a fixed period of time. The general rule in Arkansas, with respect to both public and private employees, is that employment is terminable at will if the employment contract has no fixed term. Accordingly, employees who have no fixed term would normally have no property interest in employment for purposes of the Due Process Clause of the Fourteenth Amendment. Drake contends, however, that a regulation of the Department of Human Services, Administrative Regulation 703.6, established that he could be terminated only for cause, and that, therefore, he did have a protectable property interest. The regulation in question reads as follows:

> The tenure of every permanent employee is based on satisfactory performance of duties. Permanent appointment does not guarantee a right to the position regardless of performance level; satisfactory performance is a condition of continued employment in any position. An employee is subject to discharge, suspension, demotion, or other disciplinary action for any of the following causes: insubordination, incompetence, unrehabilitated narcotics addiction, dishonesty, unrehabilitated alcoholism, conduct which adversely affects the employee's performance for the Division, conduct unbecoming a public employee, and misconduct. This provision, however, shall not be interpreted to prevent the separation of an employee because of lack of funds or curtailment of work.

The State, however, points to the organic statute of the Department of Human Services as expressly providing that no employee of the department shall have tenure. This statute, Section 11 of Act 38 of 1971, as amended, Ark. Stat. Ann. §5-912i(A) (Supp. 1985), reads as follows:

> The Director of the Department of Human Services, with the advice and consent of the Governor, shall appoint the heads of the respective divisions. Except as otherwise provided in this Act, all other personnel of the Department . . . shall be employed by and serve at the pleasure of the Director . . ., provided that nothing in this Act . . . shall be so construed as to reduce any right which an employee of the Department . . . shall have under any civil service or merit system.[4]

At first blush, the statute seems clearly inconsistent with AR703.6, which we have just quoted. On the one hand, the Legislature has provided in express words that all personnel of the Department, with exceptions not applicable to Drake, shall serve at the pleasure of the Director. On the other hand, the Department itself has issued regulations that can be read as assuring employees that they will be terminated only for cause or on account of lack of funds or curtailment of work. Conceivably the regulation might be read as an expression of the Director's "pleasure" within the meaning of the Act. Under this reading, the regulation would govern, though apparently the Director could revoke it at will. However, a good argument can be made that the regulation is invalid. It purports to place limitations upon the Director's freedom that the Legislature pretty clearly did not favor.

How to harmonize the regulation and the statute, if they can be harmonized, is of course a question of state law, and we are aware of no reported state-court decision addressing it. We do not believe, however, that the question has to be pursued in this case, because an opinion of another panel of this Court is directly in point and disposes of the plaintiff's claim. In *Hogue v. Clinton*, 791 F.2d 1318 (8th Cir.), *cert. denied*, 107 S. Ct. 648

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[4]Plaintiff does not claim any rights under the last clause of the quoted statute. That is, he does not allege that he has any rights under any civil service or merit system.

(1986), we held that an employee in the same agency as Drake, the Arkansas Department of Human Services, had no property interest in continued employment. 791 F.2d at 1324-25. We examined Arkansas law and concluded that all employment contracts with no fixed term are terminable at will, *even if* there is a provision in the employment contract that an employee will not be discharged except for good cause. In reaching this conclusion, the *Hogue* panel relied on *Griffin v. Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982). Whether *Hogue*'s reading of Arkansas law is correct is, in our view, a fairly debatable point, as the dissenting opinion of Chief Judge Lay in *Hogue* shows. But, debatable or not, *Hogue* binds this panel. One panel of this Court is not at liberty to disregard a precedent handed down by another panel. Only the Court en banc can take such action. See, *e.g.*, *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986). We therefore must apply *Hogue* and hold that plaintiff has no property interest in his job.

Drake attempts to limit or distinguish *Hogue* by citing *Lucas v. Brown & Root*, 736 F.2d 1202 (8th Cir. 1984). There, interpreting the common law of Arkansas, we recognized a public-policy exception to Arkansas's employment-at-will doctrine. We held that employees with no fixed term of employment could be dismissed without cause unless the reason for discharge was repugnant to public policy. In *Lucas*, the plaintiff successfully stated a cause of action by alleging that she had been terminated for refusing her supervisor's sexual advances. 736 F.2d at 1205. In our view, this action was repugnant to the public policy of Arkansas, and we therefore held that the complaint stated a common-law claim for breach of contract.

We believe that *Hogue*, rather than *Lucas*, controls here. *Lucas* does not hold that employees may be terminated only for good cause. It holds that they may not be terminated for causes that are contrary to the public policy of the state. Here,

plaintiff does allege that he was terminated for a reason contrary to public policy, that is, on account of his exercise of First Amendment rights, but that allegation can be fully dealt with in the context of his retaliation claim and does not require us to hold that the plaintiff has a property interest for purposes of procedural due process. A claim that one has been discharged on account of the exercise of First Amendment rights is a substantive claim, one that is good regardless of the procedures that may or may not have been followed in connection with the discharge. Thus, in order to state such a claim, it is not necessary to allege or prove that one has a property or liberty interest. These concepts are relevant only in the procedural-due-process context.

In short, we are compelled to adhere to *Hogue*, and we therefore hold that plaintiff had no property interest in his job, despite the existence of AR703.6. This holding completely disposes of plaintiff's complaint that he was denied procedural due process.[5] Any separate discussion of the defense of qualified immunity is therefore unnecessary, and plaintiff's claims, both legal and equitable, insofar as they are based on procedural due process, must be dismissed.[6]

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[5]Although plaintiff's complaint alleged that he had been deprived of a liberty interest by being stigmatized, this argument is not pressed in his brief in this Court.

[6]After the oral argument in this case, another panel of this Court handed down *Skeets v. Johnson*, 805 F.2d 767 (8th Cir. 1986). *Skeets* held that an employee of the Arkansas State Highway and Transportation Department did have a protectable property interest in his job, despite the absence of a fixed duration of employment in his contract. This holding was based upon a Highway Department manual creating a grievance procedure for discharged employees. The State's petition for rehearing en banc in *Skeets* has been granted, an action that has the automatic effect, under our practice, of vacating the

IV.

Appellants do not contend that Drake's First Amendment rights were not clearly established, nor do they argue that Drake has failed to state a claim upon which relief may be granted. Instead, they argue that Drake has failed to demonstrate that material issues of fact exist. Accordingly, they argue that this case is identical to *Wright*, and summary judgment must be granted.

Appellants base their argument partly on Drake's failure to comply with Local Rule 29 and Fed. R. Civ. P. 56(e). They contend that because Drake failed to respond adequately to their motions and affidavits, the facts as stated in their affidavits must be accepted as true, and thus Drake has failed to establish sufficient evidence in support of his claim.

It is normally for the district court to enforce compliance with its local rules. *Braxton v. Bi-State Dev. Agency*, 728 F.2d 1105, 1107 (8th Cir. 1984). The defendants in *Wright* raised the same argument, and we found this formalistic ground an inappropriate reason for decision. *Wright*, 800 F.2d at 203 n.3. Here, as in *Wright*, the District Court did not invoke its local rule as a ground for granting summary judgment. A review of the record convinces us that sufficient evidence exists overall to indicate that Drake's suit is not insubstantial. Accordingly, the magistrate's denial of summary judgment is affirmed on the First Amendment claims.

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panel opinion. The panel opinion in *Skeets* therefore has no precedential weight, and it is not necessary for us to explore whether *Skeets* and *Hogue* can be reconciled, or which of these cases governs here.

V.

To summarize: that portion of the District Court's order that denied summary judgment on plaintiff's First Amendment claim is affirmed. The denial of summary judgment on plaintiff's procedural-due-process claim is reversed, and this portion of the complaint should be dismissed with prejudice on remand.

Affirmed in part, reversed in part, and remanded with instructions.

BRIGHT, Senior Circuit Judge, concurring.

I concur in this opinion only because this panel is bound by the precedent of the majority opinion in *Hogue v. Clinton*, 791 F.2d 1318 (8th Cir. 1986).

I believe that *Hogue* was wrongly decided. Chief Judge Lay in dissent stated:

> Further, it seems clear that the "Policies and Procedures on Employee Grievance of the Department of Human Services" creates such a contract between Hogue and his employers. The grievance procedure states that an employee "who feels he/she has been terminated unfairly will have the right to appeal, under the following formal procedure." This provision may be properly construed to impose substantive restraints on the decision to terminate. The term "unfair" in the employment context lends itself to an ordinary meaning of "without good cause." Thus, the appeal procedure here should be interpreted to both create a contract between Hogue and his employer that he will not be terminated except for cause, and to transform a "mere procedure" into a substantive expectancy.

Hogue, 791 F.2d at 1326 (Lay, C.J., dissenting) (footnote omitted).

I agree with Chief Judge Lay's views, but as I have stated, this panel is bound by the principles of *Hogue* as laid down in the majority opinion.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-1353

Don G. Drake,	*	
	*	
Appellee,	*	
	*	
v.	*	
	*	
	*	On Appeal from the United
Ray Scott, Director of	*	States District Court
Arkansas Dept. of Human	*	for the Eastern District
Services; Dr. Curtis Ivery,	*	of Arkansas.
Commissioner of Social	*	
Services; and Roy Kindle,	*	
Director of Pulaski County	*	
Social Services,	*	
	*	
Appellants.	*	

Submitted: May 15, 1987
Filed: July 9, 1987

Before ARNOLD, Circuit Judge, BRIGHT, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

ARNOLD, Circuit Judge.

This case is again before us, on petitions for rehearing filed by both sides.

Our previous opinion, 812 F.2d 395 (8th Cir. 1987), held: (1) the District Court correctly denied the defendant employer's motion for summary judgment on the plaintiff employee's claim that he was discharged on account of the

exercise of First Amendment rights; and (2) the District Court incorrectly denied defendants' motion for summary judgment on plaintiffs' claim that his discharge deprived him of property (his job) without (procedural) due process of law.

The appellants' (defendants') petition for rehearing, contesting our holding on the First Amendment claim, is denied. This issue was sufficiently discussed in our previous opinion. The appellee's (plaintiff's) petition for rehearing, contesting our holding on the procedural-due-process claim, is granted. On reconsideration, however, we adhere to the result previously reached, that plaintiff had no federal constitutional right of property in his job.[1]

Our previous rejection of the plaintiff's procedural-due-process claim was based on *Hogue v. Clinton*, 791 F.2d 1318 (8th Cir.), *cert. denied*, 107 S. Ct. 648 (1986). At that time, we read *Hogue* to hold that under Arkansas law[2] "all employment contracts with no fixed term [a category that includes the present plaintiff's situation] are terminable at will, *even if* there is a provision in the employment contract that an employee will not be discharged except for good cause." *Drake v. Scott*, 812 F.2d at 400 (emphasis in original). Under this reading of *Hogue*, it was unnecessary for us to interpret the particular regulation relied on by plaintiff, AR 703.6, or to decide whether the regulation was invalid as contrary to statute, Ark. Stat. Ann. §5-912i(A) (Supp. 1985). It did not matter whether the regulation guaranteed that plaintiff would not be discharged except for good cause. All that mattered was that the contract of employment contained no fixed term of months or years.

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[1]A separate order is being entered today denying appellee's petition for rehearing en banc.

[2]Whether a certain interest is "property" within the meaning of the Due Process Clause of the Fourteenth Amendment depends on state law. *E.g.*, *Bishop v. Wood*, 426 U.S. 341, 344 & n.7 (1976).

As plaintiff points out, this reading of Arkansas law is no longer tenable. The Supreme Court of Arkansas has now re-examined the employment-at-will doctrine and announced a clear rule: if the contract of employment (which may be embodied in a personnel manual, or, as here, in a regulation) "contains *an express provision* against termination except for cause [an employee] may not be arbitrarily discharged in violation of such a provision." *Gladden v. Arkansas Children's Hosp.*, 292 Ark. 130, 136, 728 S.W.2d 501, 505 (1987) (emphasis in original). "[W]e reject as outmoded and untenable the premise announced in *St. Louis Iron Mt. Ry. Co. v. Matthews*, 64 Ark. 398, 42 S.W. 902 (1897), that the at will rule applies even where the employment agreement contains a provision that the employee will not be discharged except for cause, unless it is for a definite term." 292 Ark. at 136, 728 S.W.2d at 505.[3]

Accordingly, the mere fact that the plaintiff was not employed for a fixed term can no longer be treated as dispositive of his claim that he had a property right in his job. Under *Gladden*, which was handed down after our previous opinion in this case and (of course) after *Hogue* as well,[4] the

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[3]For a good description of the pre-*Gladden* evolution of the at-will doctrine in Arkansas, see Youngdahl, *The Erosion of the Employment-At-Will Doctrine in Arkansas*, 40 Ark. L. Rev. 545 (1987).

[4]In *Stow v. Cochran*, No. 86-1741 (8th Cir. June 1, 1987), another panel of this Court adopted the same reading of *Hogue* and of Arkansas law as we had espoused in our previous opinion on this appeal — that if there were no fixed term of employment, it did not matter whether the contract provided that there could be no discharge without good cause. The *Stow* panel evidently did not have *Gladden* called to its attention. *Gladden* was decided after the oral argument in *Stow* and only shortly before the filing of the *Stow* opinion. The result in *Stow* would apparently have been the same in any case, and for much the same reasons as apply to the case before us. The employment manual relied on by the plaintiff in *Stow* did not expressly provide that employees could be discharged only for cause. Stow claimed only an implied contract to that effect. *Stow v. Cochran*, slip op. 8.

analysis must be pursued to a more refined level. We must ask whether the regulation relied on by the plaintiff Drake expressly provides that there will be no termination except for cause.

For convenience, we again quote AR 703.6 of the Arkansas Department of Human Services:

> The tenure of every permanent employee is based on satisfactory performance of duties. Permanent appointment does not guarantee a right to the position regardless of performance level; satisfactory performance is a condition of continued employment in any position. An employee is subject to discharge, suspension, demotion, or other disciplinary action for any of the following causes: insubordination, incompetence, unrehabilitated narcotics addiction, dishonesty, unrehabilitated alcoholism, conduct which adversely affects the employee's performance for the Division, conduct unbecoming a public employee, and misconduct. This provision, however, shall not be interpreted to prevent the separation of an employee because of lack of funds or curtailment of work.

A good argument can be made that this provision, by implication, assures employees that they will not be fired except for one of the listed causes. But under Arkansas law, as recently explained in *Gladden*, that is not enough. The promise must be express, or else there is no enforceable contract, and, hence, no property right for purposes of the Due Process Clause. In *Gladden* itself one of the plaintiffs relied on an employment manual that listed a number of reasons (13, in fact) that would justify termination. 292 Ark. at 134, 728 S.W.2d at 503. In the view of the Supreme Court of Arkansas, that was not enough. Here, as in *Gladden*, there is no "express provision that discharge will not be without cause. . . ." *Id.* at

136, 728 S.W.2d at 505. The claim of a property interest in the plaintiff's job must therefore fail, and it remains unnecessary for us to decide whether AR 703.6 is invalid as contrary to statute. (It appears, in any event, that if the regulation is construed as no more than a nonexclusive list of possible causes for discharge — and under *Gladden* we must so construe it — any conflict between the regulation and the statute, which provides that employees of the Department of Human Services, with exceptions not here relevant, serve at the pleasure of the Director, is illusory only.)

Therefore, on rehearing, we adhere to the result reached by our previous opinion. That portion of the District Court's order that denied summary judgment on plaintiff's First Amendment claim is affirmed. The denial of summary judgment on plaintiff's procedural-due-process claim is reversed, and this portion of the complaint should be dismissed with prejudice on remand.

Affirmed in part, reversed in part, and remanded with instructions.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Filed Feb. 13, 1986

DON G. DRAKE ..... Plaintiff

V. Case No. LR-C-84-525

RAY SCOTT, et al. ..... Defendants

MEMORANDUM AND ORDER

From the summer of 1983 through February of 1984, the plaintiff, Don G. Drake, was employed as a caseworker with the North Pulaski County Office of the Division of Social Services, Arkansas Department of Human Services. His responsibilities included interviewing prospective food stamp applicants and reviewing food stamp requests. On February 15, 1984, Mr. Drake was terminated from his employment by Mr. Roy Kindle, Director of the Pulaski County Office of Social Services, for "dishonesty." A subsequent letter, received by Mr. Drake on February 22, 1984, stated that he was dismissed for "conduct unbecoming to a state employee."

The plaintiff then filed suit against Mr. Kindle and five other individuals and, in his complaint and amended complaint,[1] alleges that his termination as an employee of the Division of Social Services violated his rights of procedural and substantive due process guaranteed by the Fourteenth Amendment, specifically alleging that he had a protectable interest in his continued employment with the defendants. Additionally, the plaintiff maintains that the actions of the

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[1]Plaintiff was granted leave to amend his complaint, but a review of the file does not reflect a *filed* amended complaint.

defendants in terminating him were in violation of his First Amendment rights of free speech and to petition the government for redress of grievances.[2]

The case is now before this Court on the defendants' Motion to Dismiss, or, in the alternative, Motion for Summary Judgment. As a preliminary matter, we must decide whether to treat the defendants' motion as one to dismiss or one for summary judgment. Under Rule 12(b), "when matters outside the pleadings are present with a motion to dismiss for failure to state a claim and [these matters are not excluded], the motion should be treated as one for summary judgment as provided in Fed. R. Civ. P. 56. *See Carter v. Stanton*, 405 U.S. 669, 671 (1972)." *Martin v. Sargent*, No. 85-2058 (8th Cir. December 20, 1985). In the case at bar, both parties filed exhibits in support of their respective positions and, since the Court has relied upon them, at least in part, in ruling on the pending motion, the defendants' motion will be treated as one for summary judgment. *See Evans v. McDonnell Aircraft Corp.*, 395 F.2d 359, 361 (8th Cir. 1968). Considering the pending motion as one for summary judgment, the crucial question becomes whether the moving party can establish that there exists no genuine issue as to a material fact. *See Roberts v. Browning*, 610 F.2d 528, 531-32 (8th Cir. 1979). In making this determination, the Court is required to view the facts in the light most favorable to the plaintiff and to give his position the benefit of all reasonable inferences drawn from the underlying facts. *See Goodman v. Parwatikar*, 570 F.2d 801, 803 (8th Cir. 1978).

In his first claim, the plaintiff asserts that he had a

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[2]The plaintiff alleges that in November of 1983, he complained of the waste of public funds in the operation of the North Pulaski County Office of the Division of Social Services. It was Mr. Drake's contention that defendant Cook was using his position to take unauthorized leave. The plaintiff alleges that as a result of his "whistleblowing," the defendants conspired to have him fired.

property interest in his job with the Division of Social Services and that the defendants failed to provide him with adequate notice and a hearing prior to his termination in violation of his procedural and substantive due process rights under the Fourteenth Amendment.[3] Due process considerations are implicated in decisions to terminate State employees when the dismissal adversely affects a protected "property" or "liberty" interest. *Bishop v. Wood*, 426 U.S. 341 (1976); *Goetz v. Haygood*, 602 F. Supp. 1352, 1356 (E.D. Ark. 1985). Although protected by the United States Constitution, property interests are created, and their dimension defined, by existing rules or understandings that stem from an independent source such as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Skeets v. Johnson*, 609 F. Supp. 793, 796 (E.D. Ark. 1985). In the case at bar, the plaintiff maintains that he had acquired "permanent" status with the Department and was therefore entitled to notice and a hearing prior to termination. However, cases construing Arkansas law with respect to permanent employees not protected by civil service regulations or employed for a definite term, a situation in which this plaintiff finds himself, have held such employees to be terminable at will. *See Johnson v. City Council of Green Forest, Arkansas*, 545 F. Supp. 43, 50 (W.D. Ark. 1982); *Gerrin v. Hickey*, 464 F. Supp. 276, 280 (E.D. Ark. 1979). Further support for this conclusion is lent by the very statute creating the Department of Social and Rehabilitative Services, *Ark. Stat. Ann.* §5-912 (Repl. 1976 and Supp. 1985).[4] Moreover, an employee who

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[3]While plaintiff's Amended Complaint seems to raise a claim based upon an alleged deprivation of his liberty interest, his response to the defendants' Motion for Summary Judgment seems to abandon this theory of relief.

[4]"The Director of the Department of Social and Rehabilitative Services, with the advice and consent of the Governor, shall appoint the heads of the respective divisions. All other personnel of the Department . . . shall be employed and serve at the pleasure of the Director. . . ."

serves for an indefinite term is terminable at will despite "for cause" language in a personnel regulation. *See Griffin v. Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982).

Because his employment appears to have been terminable at will, the plaintiff maintains that a property interest in his job arose from a departmental personnel regulation which set up a de facto policy that a permanent employee would not be fired save "for cause." *Payne v. Ballard*, 595 F. Supp. 878, 884 (E.D. Ark. 1984), recognizes that a property interest may be created in such a manner. Because a factual question exists as to whether such an interest existed, we are unable to grant the defendants' Motion for Summary Judgment with respect to this claim.

The plaintiff's second claim for relief lies in his contention that he was terminated for exercising his First Amendment rights of freedom of speech and to petition the government for redress of grievances. Specifically, he maintains that he was dismissed for reporting that defendant Cook was taking unauthorized leave. In order to establish a prima facie case of a violation of the First Amendment speech clause, the plaintiff must show that his conduct is constitutionally protected and that it was a substantial or motivating factor in the defendants' decision to dismiss him. *See Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 278 (1977). However, when an employee raises a First Amendment violation as the basis for reviewing an employment decision made by a governmental employer, the Supreme Court requires that the protection accorded by the First Amendment be balanced against the government's interest in, and need for, efficient public administration. *See Pickering v. Board of Education*, 391 U.S. 563 (1968); *Brockell v. Norton*, 688 F.2d 588 (8th Cir. 1982).

In this case, the plaintiff alleges that he reported the

misuse of public funds, clearly a matter of compelling public concern. *Atcherson v. Siebenmann*, 605 F.2d 1058, 1063 (8th Cir. 1979). In this type of circumstance, the public employee's right to speak out on such a matter must be protected from the threat, or fact, of retaliatory discharge. *Id.* Because there exists a material fact as to whether or not the exercise of plaintiff's First Amendment rights entered into his dismissal, the Court will deny the defendants' request for summary judgment.[5]

One final note concerning the defendants' defense of qualified immunity. They maintain that *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), recognizes that defendant governmental officers are entitled to immunity for discretionary functions if their conduct did not violate clearly established statutory or constitutional rights which a person neither knew nor should have known existed. The *Harlow* decision, however, does not give courts the unguided discretion to determine what conduct is or is not reasonable in light of well-established law.

> Instead, the *Harlow* Court stated that the first inquiry of the qualified immunity analysis is whether, assuming that the government defendant violated plaintiffs' constitutional or statutory rights as they are pesently defined, did the defendant's conduct 'violate *clearly established* statutory or constitutional rights of which a reasonable person would have known' of [sic] at the time of the alleged violation? 457 U.S. at 818 (emphasis added). The Court then stated that 'if the law was clearly established, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct.' Id. at 818, 819.

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[5]Because we determined that a question remains as to whether the defendants violated the plaintiff's freedom of speech, we find it unnecessary to resolve the question raised concerning the plaintiff's First Amendment right to petition the government for a redress of his grievances.

Creighton v. City of St. Paul, 766 F.2d 1269, 1277 (8th Cir. 1985). This defense does not entitle defendants to entry of summary judgment in their favor where factual disputes remain to be resolved.

Since factual questions remain to be resolved, the defendants' Motion for Summary Judgment will be denied.

IT IS SO ORDERED this 12th day of February, 1986.

s/ H. David Young
United States Magistrate